STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2005
v	No. 252303 St Clair Circuit Court
CHARLES EDWARD JACKSON, III, Defendant-Appellant.	LC No. 03-001360-FH

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for larceny from a person, MCL 750.357. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to thirty months to 360 months' imprisonment. We affirm.

I

Defendant's conviction arose from a December 11, 2002 incident involving the theft of Candace Stocker's purse. At approximately 2:30 p.m., Stocker was returning with her wheel chair bound mother to the Blue Herron Foster Care Home following an afternoon outing. To assist her mother, Stocker had placed her purse on the ground near the rear of her vehicle. When Stocker went to retrieve her purse, she came face-to-face with defendant, who grabbed her purse and ran toward an alley between two houses. Jason Dove testified that he observed defendant grab Stocker's purse and flee the scene on foot to a red Dodge Shadow that had a leather protective covering along the hood and "Plymouth" marked across the rear of the vehicle. When the Dodge Shadow passed Dove, he was able to observe that the vehicle had only one occupant. While following defendant, Dove contacted the police and reported defendant's position and the vehicle's make and license plate number. The police investigation revealed that defendant was the registered owner and that he matched the general description provided by Dove and Stocker. During a videotaped interview at the police station, defendant stated he was the sole driver of the Dodge Shadow. Defendant did not provide an alibi, instead indicating that at the time the offense occurred, he was alone. At a pre-trial photographic line-up, Stocker identified defendant as the person who stole her purse.

At trial, the trial court, over defendant's objection, admitted into evidence the pair of boots defendant was wearing when he was arrested. Although the tread of the boots did not match the tread of two sets of foot impressions found in the snow at the scene, the trial court

admitted them as evidence as they were relevant to a determination whether the boots were the same size as the two sets of foot impressions.[1] After examining the distance between one set of footprints, Police Officer Marc Malott determined that defendant walked from the alley to Stocker's vehicle. The distance between the second set of foot prints indicated defendant ran from the scene to the alley. Detective David Seghi concurred with Malott's assessments and further concluded that the two sets of footprints were made by the same shoe worn by the same individual. Pursuant to MCL 768.20, defendant presented an alibi defense and offered the testimony of his mother, Ellen Banks. She testified that defendant was with her that afternoon between the periods of 2:00 p.m. and 5:30 p.m., and 6:15 p.m. and 8:00 p.m. Following deliberations, the jury convicted defendant as charged. Defendant now appeals.

II

The decision as to whether evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

This Court reviews a challenge to the sufficiency of the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002). This Court will not revisit the jury's determinations of the credibility of witnesses or weight of the evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). "All conflicts with regard to the evidence must be resolved in favor of the prosecution." *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000), citing *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Lee, supra* at 167-168.

In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Here, defendant failed to move for an evidentiary hearing or a new trial, therefore our review is limited to facts existing in the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

III

First, defendant asserts that the trial court erred by admitting impermissible non-expert testimony from the police officers regarding their conclusions that the shoe tracks found at the scene were consistent with Stocker's version of events and that the size of the shoe tracks were consistent with the size of defendant's boot. We disagree. Defendant failed to object to the

[1] Defendant's boots measured approximately 11.75 inches and the tracks in the snow measured approximately 12 inches.

police officer's testimony, thus our review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). A general denial of guilt puts at issue all elements of a charged offense, regardless whether any of them are specifically disputed or are stipulated. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Sabin*, *supra* at 58. In the present case, the officers' opinion was relevant because defendant raised an alibi defense that was premised on establishing that he was not in the area at the time of the offense. At a minimum, the evidence that defendant's car was seen leaving the scene, together with the fact that defendant's shoe size closely matched the size of the foot impressions, made the foot impressions evidence probative of both defendant's presence at the scene and his involvement in the crime.

We reject defendant's alternative contention that the police officers gave impermissible expert testimony. Instead, we find the police officers' testimony was properly admitted pursuant to MRE 701, which provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Additionally, "[i]n general, police officers may provide lay opinions about matters that are not overly dependent on scientific, technical, or specialized knowledge." *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989). Here, the record shows the police officers' testimony was rationally based on their own perceptions as they observed and measured the impressions and had experience following tracks and studying footprints. Nor do we find that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice pursuant to MRE 403. While the testimony was adverse to defendant's position, it was not inequitable to admit the testimony, nor was the testimony given undue or preemptive weight by the jury in light of the more damaging evidence presented against defendant which included: (1) Stocker's subsequent identification of defendant in the photo-lineup, (2) the inconsistency between defendant's initial explanation for his whereabouts at the time of the offense and his alibi defense, and (3) Dove's eyewitness account and effort to follow defendant to provide the police with the license plate number and make of defendant's vehicle. Upon our review, defendant has not established plain error. The trial court did not abuse its discretion in admitting the testimony.

We similarly reject defendant's next claim that trial counsel was ineffective for failing to object to the police officers' non-expert opinion evidence. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that counsel made an error so serious that he was prejudiced by the error in question, i.e., the error might have made a difference in the outcome of the trial. *People v*

LaVearn, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Because defendant failed to establish plain error, *supra*, we find that defendant's claims fail, as any further objection by trial counsel to the circumstantial evidence would have been meritless in light of the more damaging evidence presented against defendant. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant has failed to meet his heavy burden of demonstrating that counsel was ineffective. *Matuszak*, *supra* at 61.

In defendant's final claim of error, he argues that the evidence was insufficient to sustain his conviction for possession of larceny from a person, MCL 750.357. Defendant concedes that Stocker's testimony supported the elements of larceny from a person, but defendant nonetheless contends that her testimony when evaluated against all the evidence, was neither plausible nor sufficient to convince a jury of her guilt beyond a reasonable doubt. We disagree.

To establish larceny from a person, the prosecutor must prove (1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence. *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237, lv gtd 471 Mich 914 (2004).

In this case, when the evidence is viewed in the light most favorable to the prosecution, we find that the evidence was more than sufficient to support defendant's convictions. Setting aside defendant's concession that Stocker's testimony is sufficient to sustain his conviction, we reject defendant's contention that his conviction cannot be sustained because Stocker was not a credible witness given the inconsistencies between Stocker's initial complaint to the police, preliminary examination testimony and trial testimony. This Court will not interfere with the function of the jury to listen to testimony, weigh the evidence and credibility of the witnesses, and decide questions of fact. *Wolfe*, *supra* at 514-515. Thus, questions of credibility are left to the trier of fact and will not be judged anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Second, defendant has failed to establish that Stocker's testimony was so implausible as to be completely lacking in probative value, contradictive of indisputable physical facts or in defiance of physical realities to warrant application of the exception to the general rule regarding an appellate court's deference to the factfinder's role to assess witness credibility. See *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). Accordingly, defendant's claim must fail.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly